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Supreme Court of the United States

OCTOBER TERM, 1977

NO. 76-1726

MOBIL OIL CORPORATION,

Petitioner

versus

FRANCIS NELL HIGGINBOTHAM, ADMINISTRATRIX OF THE ESTATE OF MARSHALL K. HIGGINBOTHAM, ET AL.

Respondent

BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Respondent, Mrs. Arline J. Shinn, adopts the Statement of the Case which appears in the Brief in Response to Petition for Writ of Certiorari filed on behalf of respondent, Francis Nell Higginbotham, et al.

STATEMENT OF ISSUES

Mobil Oil Corporation has petitioned this Court to exercise its supervisory jurisdiction in order to review the decision of the United States Court for Appeals for the Fifth Circuit in this cause, alleging three grounds:

1. A conflict exists between the First and

Fifth Circuits relating to the applicability of *Moragne* to wrongful deaths occurring on the high seas;

2. The Court of Appeals for the Fifth Circuit committed error in its application of Jones Act status to James Nation; and

3. The trial court and the Court of Appeals for the Fifth Circuit committed error in their application of the doctrine of *res ipsa loquitur.*

I.

ALLEGED CONFLICT BETWEEN THE CIRCUITS

Petitioner represents to this Court that the Writ should be issued because of an alleged conflict between the decision of the Fifth Circuit in this case and that of the United States Court of Appeals for the First Circuit in *Barbe v. Drummond*.[2] It is respectfully submitted that the alleged conflict between the First and Fifth Circuits is less apparent than represented.

A detailed analysis of the decision in *Barbe v. Drummond*[3] reveals that the apparent conflict represented by petitioner is contained in dictum and is directed to a principle which is dissimilar to that at issue in the case at bar. The First Circuit Court of Appeals in *Barbe* was faced with deciding whether recovery could be made for the conscious pain and suffering endured by the decedent in an action for

1. *Moragne v. States Marine Lines*, 398 U.S. 375, 26 L.Ed. 2d 339, 90 S.Ct. 1772 (1970).

2. *Barbe v. Drummond*, 507 F.2d 794 (1st Cir. 1974).

3. *Id.*

death occurring on the high seas.

In *Barbe*, suit was brought by the administrator of the estate of the decedent, Janet Barbe, who died due to exposure after the small motorboat on which she was a passenger sank on the high seas off of the coast of Massachusetts. The district judge before whom the case was tried awarded plaintiff $15,000 for decedent's conscious pain and suffering and an additional $1,500 for funeral expenses. Defendant-owner of the small craft appealed to the United States Court of Appeals for the First Circuit claiming that the trial judge committed error by awarding damages for conscious pain and suffering. Defendant-owner contended that this type of damage is precluded from the pecuniary loss standard of the Death on the High Seas Act[4] (hereinafter referred to as DOHSA) as well as under the General Maritime Law. The court, after briefly reviewing the jurisprudence interpreting the pecuniary loss standard of DOHSA concluded that conscious pain and suffering could not be recovered under that statute.

The court then turned to an examination of the General Maritime Law to determine whether under that body of law there could be recovery for conscious pain and suffering. Plaintiff had advanced three theories of recovery. The first was to adopt state law as surrogate federal law to supplement the General Maritime Law. As both plaintiff and defendant were residents of the State of Massachusetts, plaintiff argued, it is not inimical to the maritime law to adopt the law of the state of which the litigants are citizens to complement the General Maritime Law.[5] The court, however, chose not to travel that course because it would have

4. 46 U.S.C. §§ 761, *et seq.*

5. *The Hamilton*, 207 U.S. 398, 52 L.Ed. 264 (1907).

required the federal court to ascertain whether the "state survival statute was meant to apply to admiralty claims" and also "whether the concerned state has enacted a survival statute." [6]

The second theory advanced by plaintiff was to apply *Moragne v. States Marine Lines.*[7] The court declined to apply *Moragne* in this context. It is submitted that the First Circuit correctly rejected the application of *Moragne* in that case for *Moragne* created a cause of action for wrongful death and the issue before the First Circuit was whether a cause of action survived the decedent allowing recovery for the decedent's pain and suffering endured prior to death.

The third and final theory advanced by plaintiff, and the one adopted by the First Circuit, was that *Moragne* not only removed the bar of *The Harrisburg* [8] , which precluded the decedent's survivors' cause of action to recover the damages they suffered as a result of the death, but also that *Moragne* removed the prohibition against the survival action, the action of the decedent to recover for the damages he suffered as a result of the defendant's fault.

The First Circuit relied on the reasoning advanced by the Eighth Circuit Court of Appeals in *Spiller v. Thomas M. Lowe, Jr. & Associates.*[9] In *Spiller,* several employees of the defendant-vesselowner drowned when the boat in which they were riding capsized and sank on the Red River in Arkansas. The action was brought by the personal representa-

6. *Barbe v. Drummond, supra,* at 798.

7. *Supra.* note 1.

8. 119 U.S. 199, 30 L.Ed. 358 (1886).

9. 466 F.2d 903 (8th Cir. 1972).

tives of the decedents' estates and by their surviving wives, children and parents. Liability was predicated on negligence and the unseaworthiness of the vessel. The court found no evidence of gross negligence but did find that the vessel was unseaworthy. Accordingly, judgment in the amount of $455,000 for all beneficiaries was entered.

Included in the award was $15,000 for each of the decedent's estates as compensation for the pain and suffering each decedent suffered prior to his death. The decision of the trial court finding that there existed a survival action upon which the recompense for pain and suffering was made was questioned by defendant and appealed to the Eighth Circuit.

The Circuit Court analyzed the methodology employed by this Court in *Moragne.* The Eighth Circuit reasoned as this Court did in *Moragne* that, because there is no congressional prohibition against a survivor's action and because of the multiplicity of state survivors' actions, public policy is to permit such an action; therefore, the Court was willing to make that "small leap from the decision in *Moragne* to an acceptance of the survival of personal injury actions as an integral part of the general maritime law.' " [10]

In neither *Barbe* nor *Spiller* was the court squarely faced with deciding the issue whether the wrongful death action to recover the damages suffered and sustained by the decedent's beneficiaries is to be georgrahically limited to those deaths occurring within state territorial waters; in other

10. *Spiller v. Thomas M. Lowe, Jr. & Associates, supra* at 910, n. 9, quoting from *Marsh v. Buckeye Steamship Co.,* 33 F.Supp. 972, 974-975 (N.D. Ohio 1971).

words, neither court, with respect to the *Moragne* wrongful death action as opposed to the survivor's action, decided whether DOHSA was the sole and exclusive remedy for deaths occurring on the high seas.

Petitioner's reliance on the apparent conflict between *Barbe* and the instant case is misplaced. In support of its Petition for a Writ of Certiorari to the Fifth Circuit, petitioner compares the language used by the court in *Barbe* and in this case.[11] Respondent respectfully submits to this Honorable Court that dependence on the language petitioner relies upon in *Barbe* to support the granting of writs in this instance is inappropriate and misplaced for several cogent reasons.

First, the legal proposition at issue in *Barbe* was whether recovery could be made for the conscious pain and suffering of the decedent and for funeral expenses, that is, whether the decedent's cause of action survived and could be asserted by her beneficiaries. *The language relied on by petitioner is dictum directed to the Court's analysis whether decedent's estate could recover the funeral expenses incurred.* It is in this context that the quoted language must be viewed. It is, moreover, respectfully submitted that the recovery sought for funeral expenses was made for the estate and was part of the damages sought in the survival action, not as damages recoverable in a wrongful death action.

According to *Speiser*[12], it is noted that recovery of funeral expenses can be made under either the survival action or

11. Petition of Mobil Oil Corporation, et al., at 10-11.

12. *Recovery for Wrongful Death*, §§ 3:58, 14:6 (2d Ed. 1975).

the wrongful death action, depending on whether decedent's estate paid for the funeral or whether the decedent's survivors advanced the funeral expenses.

Respondent further directs the Court's attention to the fact that the issue before it and on which petitioner seeks to invokes this Court's jurisdiction is whether plaintiffs may recover damages for loss of society in a wrongful death action. The issues presented for review are clearly inapposite to those at issue in *Barbe*.

Second, the First Circuit analyzed the reason why some courts have been reticent to grant recovery for funeral expenses incurred:

> [S]ince the estate would be liable for funeral expenses had death occurred naturally, such expenses unlike lost earnings do not represent a pecuniary loss resulting from the tortious conduct and *their recovery would represent a windfall.*[13]

Thus, the rationale of the First Circuit to deny recovery of funeral expenses in the survival action was that the estate would, regardless of the tortious conduct, nevertheless be responsible for funeral expenses: the tortious conduct of defendant merely advanced the time of payment.[14]

It is respectfully submitted that *Barbe* and the present case are inapposite and consequently the grounds to invoke the supervisory jurisdiction of this Court are insufficient.

13. *Barbe v. Drummond, supra* at 802, emphasis supplied.

14. See also *S. Speiser, supra*, § 3:58 (Supp. Dec., 1976), who concludes that this was the basis for the First Circuit's denial of recovery for funeral expenses.

"We accordingly overrule *The Harrisburg*, and hold that an action does lie under *General Maritime Law* for death caused by violation of maritime duties." [15] This was the holding of this Court through Mr. Justice Harlan in *Moragne*, creating a new cause of action for wrongful death under the General Maritime Law. The succinct and unambiguous holding of this Court is unrestricted and contains no territorial or geographic boundaries. The cause of action for wrongful death runs in favor of the beneficiaries of decedents who lose their lives regardless of the location of the delict on the high seas or within the territorial waters of a state or nation.

The question presented for review is whether the Death on the High Seas Act [16] is the exclusive remedy for deaths occurring on the high seas. It is evident from the legislative history of DOHSA, its jurisprudential development, as well as from this Court's holding in *Moragne* and its interpretation in *Sealand Services v. Gaudet* [17] that the statute was never intended to be nor is the exclusive remedy for deaths occurring on the high seas.

That DOHSA evidences no intention on the part of Congress to make the Act the sole and exclusive remedy for deaths occurring on the high seas is clear from the legislative history and debates on the floor of the House concerning the Act. As originally proposed, Section 7 of the Act stated as follows:

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15. *Moragne v. States Marine Lines, supra at 361*, emphasis supplied.

16. 46 U.S.C.§§761, *et seq.*

17. 414 U.S. 573, 39 L.Ed. 2d 9, 94 S.Ct. 806 (1974).

> That the provisions of any state Statute giving or regulating rights of action or remedies for death shall not be affected by this Act as to causes of action accruing within the territorial limits of any State.[18]

The legislative debates on the Act demonstrate that one of the major concerns of Congress was that Section 7, as originally drafted, might restrict the rights of action and remedies afforded by state law to its citizens.[19] Congressman Mann of Illinois led opposition to Section 7 because of his concern that the legislation would abrogate a citizen's right to remedies extended to him by state law. He, therefore, successfully brought an amendment to the Act which deleted the last clause, leaving Section 7 of the Act to read as follows:

> That the provisions of any state Statute giving or regulating rights of action or remedies for death shall not be affected by this chapter.[20]

It has been held by this Court that it is not inimical to the interests of the Maritime Law to give extra territorial application to state laws in maritime causes of action. In *The Hamilton*, [21] the Court, through Mr. Justice Holmes, unequivocally held that state law in an action for wrongful death between citizens of the same state could be utilized by the claimant as a means of recovery for wrongful death. The passage of DOHSA, as amended, did not in any way restrict, limit or affect the holding of this Court in that case.

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18. 59 Cong. Rec. 4480 (1920).
19. *Id.* at 4484.
20. 46 U.S.C. § 761.
21. *Supra* note 5.

Since the enactment of both DOHSA and the Jones Act[22], the courts have not interpreted either act to be the exclusive remedy to recover for the death of a seaman on the high seas. In *Doyle v. Albatross Tanker Corp.*[23], the court, faced with deciding whether the Jones Act and DOHSA were exclusive remedies, answered in the negative.

> There is not a whisper in the text of the Jones Act or its legislative history to indicate that, with respect to seamen in the special area covered by the Death on the High Seas Act, Congress intended the Jones Act to supersede the Death on the High Seas Act . . . .Moreover,. . . it appears to be the settled law of the lower federal courts, expressed in numerous cases, that both statutory remedies may be availed of for the purpose of recovering damages for the wrongful deaths of seamen caused by occurrences on the high seas, and that the action in admiralty created by the Death on the High Seas Act may be pursued by the personal representative of a deceased sailor as well as the action at law provided for in the Jones Act.[24]

It has been held, also, that DOHSA affords a remedy for an additional class of beneficiaries to that of the Jones Act, and the acts complement each other.[25]

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22. 46 U.S.C.§ 688.

23. 367 F.2d 465 (2d Cir. 1966).

24. *Id.*at 466-467; see also *Petition of Risdal & Anderson,Inc.*, 291 F.Supp. 353 (D. Mass. 1968); *Peace v. Fidalgo Island Packing Co.*, 419 F.2d 371 (9th Cir. 1969); G. Gilmore and C. Black, Jr., *The Law of Admiralty*,§ 6-31 at 364 (2d Ed. 1975).

25. *The Four Sisters*, 75 F.Supp. 399 (D. Mass. 1947).

Petitioner's position that DOHSA is the exclusive remedy for deaths occurring on the high seas and that decisional law, *Moragne*, cannot supplement the congressional act is untenable, particularly when one considers that the courts in the past have delicately woven together the rights and remedies afforded to seamen by statutes as well as decisional law. The *Jones Act*[26] was enacted by Congress to overcome the fellow servant doctrine, thus affording a seaman a cause of action for negligence against his employer. It is elementary in admiralty law that the Jones Act is not the sole and exclusive remedy afforded to seamen; a seaman has at his disposal the additional remedy of unseaworthiness which has been created by decisional law. The proposition advanced by petitioner in this cause would have the Court ignore this interrelationship of statutory and decisional remedies created for the benefit of injured seamen. As the unseaworthiness remedy supplements the negligence remedy extended by the Jones Act, the judge-made remedy for wrongful death similarly complements and supplements the statutory remedy created for deaths occurring on the high seas, DOHSA.

In creating the wrongful death remedy, in *Moragne*, Justice Harlan analyzed the effect of wrongful death legislation enacted by the states as well as the United States Congress. Legislation, he stated, plays a broader role than the limited parameters drawn by enactments of the legislative body.

> It has always been the duty of a common-law court to perceive the impact of major legislative innovations and to interweave the new legislative

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26. 46 U.S.C.§ 688.

> policies with the inherited body of common-law principles-- many of them deriving from earlier legislative exertions.[27]

What is often considered the common law finds its fountainhead in legislative enactments.[28] As every state has enacted wrongful death legislation, and as Congress has permitted recovery for wrongful death, the heretofore existing public policy against recovery for wrongful death has been abrogated; rather, the public policy is to favor recovery for the wrongful death of an individual.[29]

> Where death is caused by the breach of a duty imposed by Federal Maritime Law, Congress has established a policy favoring recovery in the absence of a legislative direction to except a particular class of cases.[30]

Prior to *Moragne*, the rules of law which had evolved concerning the rights and remedies for wrongful deaths occurring on the high seas and in state territorial waters created three anomalies which the Court recognized as inequitable.

> [First] within the territorial waters, identical conduct violating federal law (here the furnishing of an unseaworthy vessel) produces liability if the victim is merely injured, but frequently not if he is killed.

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27. *Moragne v. States Marine Lines, supra* at 352.

28. *Id.*, quoting from Landis, "Statutes and the Sources of Law," *Harvard Legal Essays*, 213 214 (1934).

29. *Id. at 361.*

30. *Id.*

> [Second] identical breaches of the duty to provide a seaworthy ship, resulting in death, produce liability outside the three mile limit . . . but not within the territorial waters of a State when a local statute excludes unseaworthiness claims.
>
> [Third] a true seaman -- that is, a member of a ship's company, covered by the Jones Act--is provided no remedy for death caused by unseaworthiness within territorial waters while a longshoreman to whom the duty of seaworthiness was extended only because he performs work traditionally done by seamen, does have such a remedy when allowed by a state statute.[31]

These anomalies recognized by the Court have destroyed the constitutionally mandated uniformity of the maritime law.

> Our recognization of a right to recover for wrongful death under General Maritime Law will assure uniform vindication of federal policies, removing the tensions and discrepancies that have resulted from the necessity to accommodate state remedial statutes to exclusively maritime substantive concepts. [Citations omitted.] Such uniformity not only will further the concerns of both of the 1920 Acts [The Death on the High Seas Act and The Jones Act] but also will give effect to the constitutionally based principle that Federal Admiralty Law would be a 'system of law co-extensive with, and operating uniformly in, the whole country.'[32]

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31. *Id.* at 353-354.

32. *Id.* at 350.

The anomalies created by the territorial distinctions noted by the Court in *Moragne* would be perpetuated and possibly even new anomalies may be created if the *Moragne* cause of action for wrongful death is to be geographically limited to those deaths occurring on territorial waters.[33]

As noted by Judge John R. Brown in *Law v. Sea Drilling Corp.*[34], a multifacted system is created by geographically limiting *Moragne* to state territorial waters:

> Where this leaves us in that the alternative to our holding is to impose an unwieldy trifid system on recovery for maritime deaths. [i] If the death occurred within territorial waters, recovery could be had under the Moragne wrongful death-survival action. [ii] If the death occurred on the High Seas and the unwary pleader invoked the magical provisions of F.R. Civ. P. 9(h), or in the unlikely event that he could not obtain jurisdiction in any state court, full survival recovery could be had under the decision law-created federal maritime survival action but wrongful death recovery would be limited to DOHSA's 'pecuniary loss.' And [iii] the legal helmsman with a closer eye on the telltale -- for the same death on the High Seas-- could file his action at law and under substantive maritime princples would recover all that Moragne and Gaudet allow.

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33. See 2 *Benedict on Admiralty* § 84, 7-37 (7th Ed. 1975); for example, the rule of *The Hamilton, supra* note 5, would presumably be viable permitting actions to be brought under state law for wrongful death where the claimant and defendant are citizens of the same state.

34. 523 F.2d 793 (5th Cir. 1975).

To limit the scope of *Moragne* would limit elements of recovery depending on the fortuitous location of the death; *Gaudet* damages for loss of society and services would be permitted for deaths occurring on territorial waters but the decedent's heirs would be precluded from that recovery for deaths occurring on the high seas. Why should elements of damages depend upon the location of the delict, particularly when a uniform body of federal law should apply? Should the rights of claimants be any more or less when tortious conduct is committed on the high seas rather than in territorial waters? Respondent respectfully submits that to geographically restrict the *Moragne* cause of action would be an arbitrary and capricious limitation which contravenes the admiralty's "special solicitude for the welfare of those men who [undertake] to venture upon hazardous and unpredictable sea voyages" and contradicts the rule of the "humane and liberal character of proceedings in admiralty to give than to withhold the remedy. . ."[35]

This Court in *Gaudet* took an expansive view of the *Moragne* cause of action holding that the recovery for wrongful death is not limited by state or federal legislation or decisional law interpreting these statutes. As stated by Gilmore and Black:

> Thus, Gaudet, if it is to be taken as representing the settled view of the majority of the Supreme Court, amply confirms our comment (written before Gaudet had been decided) that the Moragne case had 'reduced both DOHSA and the FELA death provisions incorporated in the Jones Act to the level of nonstatutory Restatements.'

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35. *Morngne v. State Marine Lines, supra* at 349.

> Under Gaudet, indeed, all the state statutes seem to have joined the federal statutes on the scrap heap.[36]

Most courts since the *Moragne* decision have recognized that the cause of action created by that case has no geographic limitations. In *Sennett v. Shell Oil Co.*[37], a case in which plaintiff was killed on the high seas, the district judge analyzed the *Moragne* decision and concluded that Congress, by enacting DOHSA, did not intend to place a limitation on recovery for maritime wrongful death. "As *Moragne* pointed out, the policy implicit in the state and federal wrongful death statutes indicates that recovery for maritime death should be permitted absent 'a legislative direction to except a particular class of cases.' [Citations omitted.] Congress has not so directed. The Death on the High Seas Act is not an exclusive remedy for those whose relatives perish wrongfully one marine league from shore."[38]

Maritime law is regulated not only by statute but also by decisional law. As this Court in *Fitzgerald v. United States Lines Co.*[39] stated:

> Article III of the Constitution vested in the federal courts jurisdiction over admiralty and mari-

36. Gilmore and Black, *supra* at 369-370.

37. 325 F.Supp. 1 (E.D. La. 1971).

38. *Id.* at 7; see also *Nye v. A/S D/S Svendborg*, 358 F. Supp. 145 (S.D. N.Y. 1973); *Estate of Kauzlarich v. Exxon Co., USA*, 405 F. Supp. 332 (D. S.C. 1975); *Hammil v. Olympic Airways, S.A.*, 398 F. Supp. 829 (D.C. D.C. 1975).

39. 374 U.S. 16, 10 L.Ed. 2d 720, 83 S.Ct. 1646 (1963).

> time cases, and, since that time, the Congress has largely left to this Court the responsibility for fashioning the controlling rules of admiralty law. This Court has long recognized its power and responsibility in this area and has exercised that power where necessary to do so.[40]

The position advanced by petitioner in this cause would have this Court abdicate its long-standing policy to fashion the rules of the General Maritime Law and weave those elements compatibly with those of statutory rules into a flexible fabric which constitutes our admiralty law. It is respectfully submitted that it was within the power and authority of this Court to create the wrongful death remedy in *Moragne* and it does not contravene any legislative purpose to give to that decisional remedy application to an area heretofore governed solely by statute.

II.

SEAMAN'S STATUS OF MR. NATION

Petitioner further contends to this Honorable Court that the decision of the Fifth Circuit granting Jones Act status to James Nation is without merit and should be reversed. The Court, in holding that Mr. Nation was a Jones Act seaman and was entitled to bring an action under the Jones Act against his employer, analyzed Mr. Nation's work history and reasoned that over the two years prior to his death he performed a substantial amount of his work aboard vessels and that his assignment to the fixed platform was fortuitous and of a temporary nature. To deny Mr. Nation Jones Act

41. *Id.* at 10 L.Ed. 2d 724.

status solely because of the work assignment at the time of his death would ignore the primary function and purpose he served as an employee of Mobil.

Petitioner would suggest to this Honorable Court that the approach of the Fifth Circuit in affording Jones Act status to Mr. Nation is a novel and new approach fraught with perplexing and unsolvable problems. To the contrary. The approach taken by the Court in affording Jones Act status to Mr. Nation is neither novel nor unworkable. It merely represents the application of principles which recently evolved in the jurisprudential development of the Jones Act in the Fifth Circuit.

In particular, respondent respectfully submits that the approach taken by the Fifth Circuit to analyze the claimant's work history is one utilized in *Holland v. Allied Structural Steel Co.*[41] In that case, the court reversed the jury's determination that the decedent, a structural steel worker, was a seaman within the purview of the Jones Act. The court found that the decedent's contact with vessels was intermittent and stated that in analyzing seamen's status under the Jones Act the court must focus "on an employee's principal duties, the time spent aboard or in the service of a vessel, and the relation of his injury to his vessel-related activities."[42]

Respondent further respectfully submits that the issues of Jones Act status in this cause is the transposition of that

41. 539 F.2d 476 (5th Cir. 1976).

42. *Id.* at 479.

at issue in *Brown v. ITT Rayonier*,[43] wherein the claimant, seeking to recover damages for injuries sustained while riding in a motorboat in order to obtain water samples for his employer, was denied Jones Act status. Though the plaintiff in that cause was found to be aiding in the function or mission of the vessel and though the vessel was in navigation, the court found that he was a "casual worker on the water" whose work on the vessel was incidental to his shore-based employment.[44] As Mr. Brown was denied Jones Act status because of his intermittent contact with the vessels, Mr. Nation should not be denied Jones Act status because of his intermittent and transient contact with a fixed stationary platform. To do so would contravene the admiralty's humane and liberal policy to give rather than withhold a remedy.

III.

RES IPSA LOQUITUR

Petitioner finally seeks review of the decision in this cause assessing liability against it by the application of the doctrine of res ipsa loquitur. The elements of that legal principle are perhaps best defined in Section 328D, Restatement of Torts (Second):

> (1) It may be inferred that harm suffered by the plaintiff is caused by negligence of the defendant when
>
> (a) The event is of a kind which ordinarily does not occur in the absence of negligence;

43. 497 F.2d 234 (5th Cir. 1974)

44. *Id* at 238.

(b) Other responsible causes including the conduct of the plaintiff and third persons are sufficiently eliminated by the evidence; and

(c) The indicated negligence is within the scope of the defendant's duty to the plaintiff.

This doctrine permits the trier of fact to infer from the facts presented that the delict was caused by the defendant's fault; in other words, the act would not ordinarily have happened in the absence of fault on the part of someone. The party invoking the rule need not exclude any other possibilities of the cause of the accident; it is sufficient to prove facts from which the trier of fact may reasonably conclude that the fault was more probably than not that of the defendant. *Sweeney v. Erving.*[45]

That the doctrine applies in admiralty is unquestioned. *Johnson v. United States.*[46]

The state of the art of aircraft technology, design, and training permits the application of res ipsa loquitur to aircraft cases. *Cox v. Northwest Airlines.*[47] In *Williams v. United States*[48] the Fifth Circuit stated:

> Res ipsa loquitur is a rule based upon human experience and its application to a particular situation must necessarily vary with human experience. A situation to which the doctrine was not applicable a half century ago because of insuf-

45. 228 U.S. 233, 57 L.Ed. 815, 33 S.Ct. 416 (1913).

46. 333 U.S. 46, 92 L.Ed. 468, 68 S.Ct. 391 (1948).

47. 397 F.2d 893 (7th Cir. 1967).

48. 218 F.2d 473 (5th Cir. 1955).

> ficient experience or a lack of technical knowledge, might today fall within the scope of the rule, depending upon what experience is shown.[49]

The Fifth Circuit in this case relied on the opinions in *Colditz v. Eastern Airlines,*[50] *White v. Transworld Airlines,*[51] and *Mobil Chemical Co. v. Bell,*[52] all of which involved issues substantially similar to those in this matter. In those cases, the courts sustained the application of the res ipsa loquitur rule because the circumstances of the accident raised the inference that the accident would not have occurred but for the negligence of the defendant.

The second requirement of the rule is that the instrument causing harm be within the exclusive control of the defendant. The helicopter in question was maintained by employees of Mobil, housed at Mobil facilities and flown by Mobil pilots. On the fatal day the pilot of the helicopter was a Mobil employee. That the instrumentality causing the deaths in this case was in the exclusive control of Mobil cannot be denied.

Finally, in affirming the judgment of the district court, the Fifth Circuit found that the decision of the trial court was not clearly erroneous. The district judge was able to evaluate the testimony of the live witnesses and in the absence of clear error, the judgment was properly affirmed.[53]

49. *Id.* at 476.

50. 329 F.Supp. 691 (S.D.N.Y. 1971).

51. 320 F.Supp. 655 (S.D. N.Y. 1970).

52. *Mobil Chemical Co. v. Bell,* 517 S.W. 2d 245 (Tex. 1974).

53. *McAllister v. United States.* 348 U.S. 19, 99 L.Ed. 20, 75 S.Ct. 6 (1954)

CONCLUSION

In summary, respondent submits that petitioner's grounds for this Court's review of the application of the Federal Maritime Law to deaths occurring on the high seas is unsupported by the *Moragne* decision and its progeny. The alleged conflict between the First and Fifth Circuits does not exist as the cases relied on by petitioner are inapposite.

Furthermore, the decision of the Fifth Circuit to afford Mr. Nation a Jones Act remedy is in line with the jurisprudence interpreting the Jones Act. There is an invalid basis advanced by petitioner to grant a writ on that issue.

Finally, the Court's application of the res ipsa loquitur doctrine is clearly supported by the evidence and the facts. Absent a finding that the trial court's evaluation of the evidence and the applicable law is clearly erroneous there are insufficient grounds to grant a writ to review that issue.

Accordingly, respondent respectfully urges that this Court exercise its discretion and deny the Writ of Certiorari requested by petitioner.

Respectfully submitted,

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By: _____

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CERTIFICATE OF SERVICE

The undersigned counsel for respondent has caused three copies of the foregoing Brief in Response to Petition for Writ of Certiorari to be served on Carl J. Schumacher, Jr., 1106 Arabella Street, New Orleans, Louisiana 70115; Jack Caldwell, 519 Main Street, Post Office Box 592, Franklin, Louisiana 70538; Messrs. Christovich & Kearney, American Bank Building, New Orleans, Louisiana 70130; Messrs. Thompson and Sellers, Post Office Box 308, 112 South Louisiana Avenue, Abbeville, Louisiana 70510; and I.P. Saal, Jr., Post Office Box 176, Gueydan, Louisiana, by placing same in the United States mail, postage prepaid, this 9th day of September, 1977.

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Jack C. Benjamin